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) DOCKET NO. CWA-10-2001-0004
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) COMPLAINT
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2. Pursuant to Section 309(g)(2)(B) of the Act, and in accordance with the “Consolidated Rules of Practice Governing the Administrative Assessment of Civil Penalties,” 40 C.F.R. Part 22 (“Part 22 Rules”), Complainant hereby proposes the assessment of a civil penalty against Kees C.J. Kea (“Respondent”) for the unlawful discharge of pollutants into navigable waters in violation of Section 301(a) of the Act, 33 U.S.C. § 1311(a).

II. ALLEGATIONS

3. Section 301(a) of the Clean Water Act, 33 U.S.C. § 1311(a), prohibits the “discharge of a pollutant” by any person to navigable waters of the United States, except, *inter alia*, as authorized by a National Pollutant Discharge Elimination System (“NPDES”) permit issued pursuant to Section 402 of the Act, 33 U.S.C. § 1342. Section 504(12) of the Act, 33 U.S.C. § 1362(12), defines the term “discharge of a pollutant” to include “any addition of any pollutant to navigable waters from any point source.”

4. Respondent is an individual and therefore a “person” as defined by Section 502(5) of the Act, 33 U.S.C. § 1362(5).

5. At all times relevant to this Complaint, Respondent has operated the Paramount Dairy in Tillamook County, Oregon.

6. The Paramount Dairy confines and milks approximately 600 mature dairy cows.

7. The production area of the Paramount Dairy contains a “milk house” in which milk is chilled and stored in tanks prior to being shipped off-site for processing and sale.

8. Approximately 100 yards southwest of the milk house is an unnamed, natural tributary of Mill Creek. This unnamed tributary is known locally as “Jane’s Creek.”

9. “Jane’s Creek” flows into Mill Creek. Mill Creek flows into the Trask River, a tributary of Tillamook Bay. Tillamook Bay is subject to the ebb and flow of the tide.

10. “Jane’s Creek” is “navigable waters” as defined by Section 502(7) of the Act, 33 U.S.C. § 1362(7), and “waters of the United States” within the meaning of 33 U.S.C. § 1362(7) and 40 C.F.R. § 122.2.

11. The milk house contains two milk storage tanks which are drained and cleaned daily. At all times relevant to this Complaint, the milk storage tank cleaning process involved rinsing one or both of the tanks each day with water, phosphoric acid, and Dynemate II, a commercial detergent containing sodium hydroxide (caustic soda) and sodium hypochlorite (chlorine bleach). Each day, a mixture of residual milk, wash water, phosphoric acid, and Dynemate II was flushed from the milk storage tanks onto the milk house floor, where it flowed into a floor drain.

12. At all times relevant to this Complaint, the milk house floor drain also collected rinsate from the milk lines that lead to the milk storage tanks as well as wash water from boots and clothing that had become contaminated with manure.

13. Manure, residual milk, wash water, phosphoric acid, and Dynemate II are and contain “pollutant[s]” within the meaning of Section 502(6) of the Act, 33 U.S.C. § 1362(6).

14. At all times relevant to this Complaint prior to February 18, 2000, the milk house floor drain was connected by an underground pipe to an outfall at “Jane’s Creek.”

15. The underground pipe connecting the milk house floor drain to “Jane’s Creek” was a “point source” within the meaning of Section 502(14) of the Act, 33 U.S.C. § 1362(14).

16. On February 16, 17, and 18, 2000, EPA conducted a series of NPDES inspections of the Paramount Dairy.

17. On February 16 and 17, 2000, EPA observed a mixture of residual milk, wash water, phosphoric acid, Dynemate II, and manure being discharged from the milk house to “Jane’s Creek.”

18. Upon information and belief, Respondent discharged a mixture of residual milk, wash water, phosphoric acid, Dynemate II, and manure from the milk house to “Jane’s Creek” each day between November 1, 1995 and February 18, 2000.

19. The discharges described in Paragraph 18 above constituted “discharge[s] of pollutants” within the meaning of Section 502(12) of the Act, 33 U.S.C. § 1362(12), from a “point source” within the meaning of Section 502(14) of the Act, 33 U.S.C. § 1362(14).

20. At the time of the discharges of pollutants described in Paragraph 18 above, Respondent had not obtained coverage under an NPDES permit for the discharges from the Paramount Dairy milk house.

III. PENALTY

21. The discharges of pollutants described in Paragraph 18 above were unauthorized discharges of pollutants to waters of the United States and constitute no less than 1,570 days of violation of Section 301 of the Act, 33 U.S.C. § 1311(a). Consequently, pursuant to Section 309(g)(2)(B) of the Act, and 40 C.F.R. Part 19, the Respondent is liable for the administrative

1 assessment of civil penalties in an amount not to exceed \$11,000 per violation for each day during
2 which the violation continued, up to a maximum of \$137,500.

3 22. In accordance with Section 22.14 of the Part 22 Rules, 40 C.F.R. § 22.14(a)(4)(ii), this
4 Complaint does not include a specific penalty demand. Pursuant to Section 309(g)(3) of the Act, 33
5 U.S.C. § 1319(g)(3), EPA must, in determining the specific penalty to be assessed in this matter, take
6 into account the nature, circumstances, extent, and gravity of the violation, and, with respect to
7 Respondent, ability to pay, prior history of violations, degree of culpability, economic benefit and
8 savings (if any) resulting from the violation, and such other matters as justice may require.

9 23. The nature, circumstances, extent, and gravity of the violations described above are
10 significant. The violations resulted in the discharge of a mixture of residual milk, wash water,
11 phosphoric acid, Dynemate II, and manure to waters of the United States. When used as directed,
12 Dynemate II rinse water contains sodium hydroxide at concentrations that can be acutely toxic to
13 plants and aquatic life. Milk wastes, manure, and phosphoric acid are also typically high in nutrients
14 which can cause decreased oxygen levels in receiving waters. Decreased oxygen levels can adversely
15 impact many species of fish indigenous to the tributaries of Tillamook Bay (including salmonid
16 species listed as endangered or threatened under the Endangered Species Act) during their
17 developmental stages as well as at maturity.

18 24. Based on the information available to EPA regarding Respondent's financial condition,
19 Respondent appears able to pay a civil penalty of up to \$137,500. Should Respondent submit
20 information substantiating an inability to pay this amount, the specific assessed penalty will be
21 adjusted to reflect this inability.

22 25. Respondent's degree of culpability is high. Respondent knew that milk house wastes
23 were being discharged to "Jane's Creek" for months if not years prior to February 2000, yet took no
24 action to discontinue these discharges.

25 26. By delaying the costs associated with rerouting the milk house wastes from "Jane's
26 Creek," Respondent realized economic benefit as a result of the violations alleged above.

1 **IV. OPPORTUNITY TO REQUEST A HEARING**

2 27. Respondent has the right to file an Answer requesting a hearing on any material fact
3 contained in this Complaint or on the appropriateness of the penalty proposed herein. Upon
4 request, the Presiding Officer may hold a hearing for the assessment of these civil penalties,
5 conducted in accordance with the provisions of the Part 22 Rules and the Administrative Procedure
6 Act, 5 U.S.C. § 551, *et seq.* A copy of the Part 22 Rules accompanies this Complaint.

7 28. Respondent's Answer, including any request for hearing, must be in writing and must
8 be filed with:

9 Regional Hearing Clerk
10 U.S. Environmental Protection Agency, Region 10
11 1200 Sixth Avenue, Mail Stop ORC-158
Seattle, Washington 98101

12 **V. FAILURE TO FILE AN ANSWER**

13 29. To avoid a default order being entered pursuant to Section 22.17 of the Part 22 Rules,
14 40 C.F.R. § 22.17, Respondent must file a written Answer to this Complaint with the Regional
15 Hearing Clerk within thirty (30) days after service of this Complaint.

16 30. In accordance with Section 22.15 of the Part 22 Rules, 40 C.F.R. § 22.15,
17 Respondent's Answer must clearly and directly admit, deny, or explain each of the factual allegations
18 contained in this Complaint with regard to which Respondent has any knowledge. Respondent's
19 Answer must also state: (1) the circumstances or arguments which are alleged to constitute the
20 grounds of defense; (2) the facts which Respondent intends to place at issue; and (3) whether a
21 hearing is requested. Failure to admit, deny, or explain any material factual allegation contained
22 herein constitutes an admission of the allegation.

23
24 **VI. INFORMAL SETTLEMENT CONFERENCE**

25 31. Whether or not Respondent requests a hearing, Respondent may request an informal
26 settlement conference to discuss the facts of this case, the proposed penalty, and the possibility of
27 settling this matter. To request such a settlement conference, Respondent should contact:
28

1 R. David Allnutt
2 Assistant Regional Counsel
3 U.S. Environmental Protection Agency, Region 10
4 1200 Sixth Avenue, Mail Stop ORC-158
5 Seattle, Washington 98101
6 (206) 553-2581

7 32. Note that a request for an informal settlement conference does not extend the thirty
8 (30) day period for filing a written Answer to this Complaint, nor does it waive Respondent's right
9 to request a hearing.

10 33. Respondent is advised that Section 22.8 of the Part 22 Rules prohibits any *ex parte*
11 (unilateral) discussion of the merits of these or any other factually related proceedings with the
12 Administrator, the Environmental Appeals Board or its members, the Regional Administrator, the
13 Presiding Officer, or any other person who is likely to advise these officials on any decision in this
14 case.

15 **VII. RESERVATIONS**

16 34. Neither assessment nor payment of an administrative civil penalty pursuant to this
17 Complaint shall affect Respondent's continuing obligations to comply with: (1) the Clean Water Act
18 and all other environmental statutes; (2) the terms and conditions of all applicable Clean Water Act
19 permits; and (3) any Compliance Order issued to Respondent under Section 309(a) of the Act, 33
20 U.S.C. § 1319(a), concerning the violations alleged herein.

21 Dated this ____ day of _____, 2000

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23 _____
24 Randall F. Smith
25 Director
26 Office of Water
27 U.S. EPA Region 10
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CERTIFICATE OF SERVICE

I certify that the foregoing "Complaint" was sent to the following persons, in the manner specified, on the date below:

Original and one copy, hand-delivered:

Mary Shillcutt, Regional Hearing Clerk
U.S. Environmental Protection Agency, Region 10
1200 Sixth Avenue, Mail Stop ORC-158
Seattle, Washington 98101

Copy, together with a cover letters and copy of the Part 22 Rules, by certified mail, return receipt requested:

Kees C. J. Kea
Paramount Dairy
9090 Mill Creek Road
Tillamook, Oregon 97141

Dated: _____
Cindy Phung
U.S. EPA Region 10